84-979

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

REBECCA MAE CROSS,
Petitioner,

vs.

UNITED STATES POSTAL SERVICE;
THE BOARD OF GOVERNORS OF THE
UNITED STATES POSTAL SERVICE;
M.A. WRIGHT; R.E. HOLDING;
CHARLES H. CODDING; WILLIAM A. IRVINE;
CROCKER NEVIN; HAYES ROBERTSON
AND BENJAMIN F. BAILAR,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER THE UNITED STATES POSTAL SERVICE, CREATED BY AN ACT OF CONGRESS IN 1970 AND THEREIN AUTHORIZED "TO SUE AND BE SUED," 39 U.S.C. 401(1), IS IMMUNIZED AGAINST AN AWARD OF PREJUDGMENT INTEREST WHEN IT VIOLATES THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, 42 U.S.C. 2000e, et seq.

EDITOR'S NOTE

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NO.

In The

SUPREME COURT OF THE UNITED STATES

October Term 1984

Rebecca May Cross,

Petitioner,

v.

United States Postal Service; The Board of Governors of the United States Postal Service; M.A. Wright; R.E. Holding; Charles H. Codding; William A. Irvine; Crocker Nevin; Hayes Robertson and Benjamin F. Bailar,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CITATION TO OPINIONS BELOW

The panel opinion of the Eighth Circuit Court of Appeals entered on May 14, 1984 and the Order entered

by that court en banc on September 20, 1984, upholding the panel majority's opinion by an equally divided court are reported at 733 F.2d 1327 (8th Cir. 1984) and printed in the Appendix. Also in the Appendix are the court's Order of October 18, 1984 denying reconsideration and its Order of October 30, 1984 amending that of October 18, 1984 to reflect Chief Judge Donald P. Lay's nonparticipation in the en banc proceedings and in those subsequent thereto.

The district court's Memorandum and Order of June 30, 1982, denying petitioner prejudgment interest and its Order of January 5, 1982 denying petitioner's motion to reconsider the issue of prejudgment interest are not reported and are printed in the Appendix.

JURISDICTIONAL STATEMENT

On September 20, 1984, the United States Court of Appeals for the Eighth Circuit en banc issued its Order affirming by an equally divided court the district court's judgment and the panel majority's opinion upholding it. On October 4, 1984 petitioner filed a supplemental petition for rehearing and suggestions for rehearing en banc which was denied on October 18, 1984 with Chief Judge Donald P. Lay not participating.

Jurisdiction of the Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTE INVOLVED

The Postal Reorganization Act of 1970 provides in relevant part, as follows at 39 U.S.C. 401(1):

The Postal Service shall have the following general powers:

> (1) to sue and be sued in its official name;

STATEMENT OF THE CASE

Petitioner Cross is a black woman who prevailed on her claim under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16, that the United States Postal Service refused unlawfully to hire her because of race when she applied for available employment in or about 1976. **Cross v. United States Postal Service,** 639 F.2d 409 (8th Cir. 1981) rev'g 483 F.Supp. 1050 (E.D.Mo. 1979).

On remand to the district court from the United States Court of Appeals for the Eighth Circuit, petitioner received employment, back pay, attorneys' fees and expenses but was denied prejudgment interest on her monetary award. Petitioner's motion for reconsideration

on the availability of prejudgment interest was denied and petitioner appealed the matter.

On appeal to the Court of Appeals for the Eighth Circuit, a panel of that court (with a dissent) affirmed the district court's denial of prejudgment interst, holding that Congress did not waive sovereign immunity in actions under Title VII against the United States Postal Service. In so holding, the court ruled that waiver of immunity must be found in the statute that gives rise to the cause of action.

When considered en banc, without Chief Judge Donald Lay's participation, the Court of Appeals divided equally, thereby affirming the judgment of the district court.

ARGUMENT

Whether The United States Postal Service, Created By An Act Of Congress In 1970 And Therein Authorized "To Sue And Be Sued," 39 U.S.C. 401(1), Is Immunized Against An Award Of Prejudgment Interest When It Violates The Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e, et seq.

It is well settled at least with respect to employers in the private sector that prejudgment interest is available under Title VII's remedial "make whole" provisions. **EEOC v. Wooster Brush Co.**, 727 F.2d 566, 578-79 (6th Cir. 1984); **Parsons v. Kaiser Aluminum and Chemical Corp.**, 727 F.2d 473, 478 (5th Cir. 1984); **Washington v. Kroger Co.**, 671 F.2d 1077, 1078 (8th Cir. 1982); **United States v. Leeway Motor Freight, Inc.**, 625 F.2d 919, 940 (10th Cir. 1979). See also, **Albemarle Paper Co. v. Moody**, 422 U.S. 405, 418-21 (1975).

Petitioner claims that Congres intended to waive sovreign immunity when it passed the Postal Reorganization Act in 1970 and gave the Postal Service the right "to sue and be sued" 39 U.S.C. 410(1). Absent

the immunity, the Postal Service is responsible to the petitioner for interest under Title VII. Accord, **White v. Bloomberg,** 501 F.2d 1379 (4th Cir. 1974).

The panel majority's stated rationale for limiting the waiver of immunity contained in 39 U.S.C. 401(1) of the Postal Reorganization Act — that such a waiver must be found, if at all, in the statute giving rise to the cause of action — cannot be reconciled with **Franchise Tax Board of California v. United States Postal Service,** __ U.S. __, 81 L.Ed.2d 446 (1984) or prior cases, e.g., **Federal Housing Administration v. Burr,** 309 U.S. 242 (1940); **White v. Bloomberg,** 501 F.2d 1379, 1385-86 (4th Cir. 1974).

Indeed, were the panel majority's rationale the rule of law, each of the cases cited in the preceeding paragraph would have been decided differently. **Franchise Tax Board of California v. United States Postal Service** did not arise under the enabling statute, 39 U.S.C. 101 et seq.; it arose under state law as did the causes of action in **Federal Housing Administration v. Burr,** supra.[1] The cause of action in **White v. Bloomberg,** supra arose under the Federal Back Pay Act, 5 U.S.C. 5596.

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[1]See also, **May Department Stores v. Williamson,** 549 F.2d 1147 (8th Cir. 1979)

Contrary to the propositions set out in **FHA v. Burr,** supra and reiterated more recently in **Franchise Tax Board of California v. United States Postal Service,** supra, the panel's majority gave no indication of any sensitivity to the liberal construction required of waivers, **Franchise Tax Board,** supra, 81 L.ed 22 at 451-52, and "lightly" assumed that limitations on the waiver were to be implied as a matter of course unless the waiver was in the statute giving rise to the action. Moreover, rather than applying the analysis in **Franchise Tax Borad** and **Burr,** supra vis a vis 39 U.S.C. 401(1) which supports the petitioner's position, the panel's majority focused on Title VII's remedial provisions, which are silent on the question of prejudgment interest against the Postal Service, and finding no waiver therein, erroneously concluded that Congress intended none.

Congress did not intend via 39 U.S.C. 401(1) to preserve sovereign immunity rather, as stated in **Franchise Tax Board of California v. United States Postal Service,** supra 81 L.ed 2d at 452-53, ". . . it wished the Postal Service to be run more like a business than its predecessor, the Post Office Department". Accordingly, among other things, Congress provided the Postal Service with the powers necessary to be a "self-supporting enterprise", **Standard Oil Division, American Oil Co. v. Starks,** 528

F.2d 201, 203 (7th Cir. 1975) (per curiam),[2] including the power to "sue and be sued". Its employees are compensated at rates available to employees in the private sector, 39 U.S.C. §§ 101(c), 1003(a), have the right to bargain collectively, and their relations with management are subject generally to the National Labor Relations Act. 39 U.S.C. 1201-1209.

The Amendment in 1972 of Title VII of the Civil Rights Act, 42 U.S.C. 2000e et seq, including federal employees and specifically also employees of the Postal Service, 42 U.S.C. 2000e-16(a), was intended to provide these employees (and applicants for employment) ". . . the full rights available in the courts as are granted to individuals in the private sector under Title VII". **Chandler v. Roudebush,** 425 U.S. 840, 841 (1976) (quoting S.Rep. No. 415, 92d Cong., 1st Sess. 16 (1971). Title VII does not purport to nullify any waivers previously made at 39 U.S.C.

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[2]Although perhaps not entirely a government corporation, any distinction between the Postal Service and the Federal Housing Authority's position in **FHA v. Burr,** 309 U.S. 242 (1940) are differences without substance. See, **Cross v. United States Postal Service,** 733 F.2d 1327, 1332 (8th Cir. 1984) (J. Arnold, dissenting). See also, **White v. Bloomberg,** 501 F.2d 1379, 1385-86 (4th Cir. 1974). This Court has noted recently that the waiver of immunity in 39 U.S.C. 401(1) is broader than than of the Federal Housing Authority. **Franchise Tax Board of California b. United States Postal Service,** supra 81 L.ed 2n at 452.

401(1). "Title VII contains no language limiting the relief available to federal employees; limits on prejudgment interest have been imposed solely because of the barrier of sovereign immunity — a barrier deliberately lifted by Congress when it created the Postal Service". **Cross v. United States Postal Service,** 733 F.2d 1327, 1332 (8th Cir. 1984) (J. Arnold, dissenting).

Finally, the challenged decision is in conflict with **White v. Bloomberg,** 501 F.2d 1379, 1385-86 (4th Cir. 1974) wherein the court, using the analysis of **FHA v. Burr,** supra, inter alia, affirmed an award of post-judgment interest against the Postal Service in an action under the Federal Back Pay Act, 5 U.S.C. 5596.

This latter point alone justifies review. When considered in conjunction with the preceeding considerations, review is required in order to secure and maintain uniformity of decisions.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

AMENDED ORDER

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1305

No. 83-1761

Rebecca May Cross,

Appellant,

v.

United States Postal Service, et al.,

Appellees.

Appeals from the United States District Court for the Eastern District of Missouri.

September Term, 1984

Appellant's petition for rehearing en banc filed October 4, 1984 has been considered by the Court and is denied. Petition for rehearing by the panel is also denied. Judge Donald P. Lay did not participate.

October 30, 1984

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1305
No. 83-1761

Rebecca May Cross,
Appellant,
v.
United States Postal Service, et al.,
Appellees.

Appeals from the United States District Court for the Eastern District of Missouri.

September Term, 1984

Appellant's petition for rehearing en banc filed October 4, 1984 has been considered by the Court and is denied. Petition for rehearing by the panel is also denied.

October 18, 1984

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1305
No. 83-1761

Rebecca May Cross,
Appellant,
v.
United States Postal Service; The Board of Governors of the United States Postal Service; M.A. Wright; R.E. Holding; Charles H. Codding; William A. Irvine; Crocker Nevin; Haves Robertson and Benjamin F. Bailar,
Appellees.

Appeals from the United States District Court for the Eastern District of Missouri.

Submitted: September 13, 1984
Filed: September 20, 1984

Before HEANEY, BRIGHT, ROSS, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, and BOWMAN, Circuit Judges, en banc.

ORDER

This case has been considered by the Court en banc.* Judges Heaney, Arnold, John R. Gibson, and Fagg would reverse the panel opinion and reverse the district court judgment. Judges Bright, Ross, McMillian, and Bowman would affirm the panel opinion and affirm the district court judgment. Therefore, the judgment of the district court is affirmed by an equally divided Court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

*Chief Judge Donald P. Lay did not participate in the vote on this case.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1305
No. 83-1761

Rebecca May Cross,
Appellant,
v.
United States Postal Service; The Board of Governors of the United States Postal Service; M.A. Wright; R.E. Holding; Charles H. Codding; William A. Irvine; Crocker Nevin; Hayes Robertson and Benjamin F. Bailar,
Appellees.

Appeals from the United States District Court for the Eastern District of Missouri.

Submitted: November 16, 1983
Filed: May 14, 1984

Before ROSS, ARNOLD, and BOWMAN, Circuit Judges

BOWMAN, Circuit Judge.

Rebecca Mae Cross has prevailed in her action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-16, as amended in 1972, against the United States Postal Service and its Board of Governors (USPS) for refusal to hire her because of her race. See **Cross v. United States Postal Service**, 639 F.2d 409 (8th Cir. 1981), rev'g 483 F. Supp. 1050 (E.D. Mo. 1979). On remand, the District Court proceedings included determinations of back pay, attorneys' fees, and expenses.[1] The issue on this appeal is whether Cross was entitled to prejudgment interest on her monetary award. We affirm the District Court's denial of prejudgment interest.

Although prejudgment interest on monetary awards under Title VII is available in actions against private employers, see, e.g., **Washington v. Kroger Co.**, 671 F.2d 1072, 1078 (8th Cir. 1982), interest awards in actions against a governmental unit raise sovereign immunity issues. See, e.g., **Brown v. GSA**, 425 U.S. 820, 833-34 (1976). The general rule is that the federal government,

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[1] USPS argues that this Court lacks jurisdiction to hear the appeal because there was no entry of final judgment by the district court when Cross filed her notice of appeal. Premature filing of the notice of appeal bars appellate jurisdiction. **Griggs v. Provident Consumer Discount Co.**, 103 S.Ct. 400 (1982). However, after the District Court entered a final judgment on June 8, 1983, a supplmental notice of appeal was filed timely. Accordingly, there is no merit in USPS's jurisdictional argument.

as sovereign, is immune from suit save as it consents to be sued; the terms of consent define the extent of the plaintiff's rights and the court's jurisdiction to entertain the suit. See **Lehman v. Nakshian,** 453 U.S. 156, 160 (1981) (no right to trial by jury in age discrimination suit by federal employees); **United States v. Sherwood,** 312 U.S. 584, 586 (1941) (federal court has no jurisdiction under Tucker Act over suits against the United States by a creditor of a party to a contract with the United States which the United States has breached); **Bor-son Bldg. Corp. v. Heller,** 572 F.2d 174 (8th Cir. 1978) (remedy under Federal Tort Claims Act is exclusive despite statutory authority of any federal agency to "sue and be sued"). The question then is whether Congress has waived common law sovereign immunity with regard to prejudgment interest on money judgments against the USPS in Title VII cases.

If a waiver of immunity with respect to interest is to be found at all, it must be found in the statute that gives rise to the cause of action. See **Murray v. United States,** 686 F.2d 1320, 1325 (8th Cir. 1982), cert. denied, 103 S.Ct. 788 (1983); **Garcia v. United States,** 666 F.2d 960, 966 (5th Cir.), cert. denied, 103 S.Ct. 73 (1982). In 1972, Congress amended Title VII, making it applicable for the first time to the federal government. See 42 U.S.C. §2000e-16. These amendments created "an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination." **Brown,** 425 U.S.

at 829. The mere fact that these amendments of Title VII are remedial does not mean that we should liberally construe them to allow prejudgment interest against an arm of the federal government. Every statute that waives sovereign immunity is remedial. See, **Monark Boat Co. v. NLRB**, 708 F.2d 1322, 1327 (8th Cir. 1983) (construing Equal Access to Justice Act). Both the amended Title VII and its legislative history are silent with regard to interest awards against the government. Congress has not expressed an affirmative intention to allow interest.[2] Cf. 42 U.S.C. §2000e-5(k) (specifically excluding the United States as a prevailing party from an attorney's fee award and specifically making it liable for costs). We agree with several other circuits that there is no provision

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[2]The Supreme Court has suggested that interest cannot be recovered against the government absent an express provision for interest in a relevant statute or contract. See, e.g., **United States v. Thayer-West Point Hotel Co.**, 329 U.S. 585, 588 (1947). But some cases suggest that the statute must simply evince the intention to allow interest. See, e.g., **Smyth v. United States**, 302 U.S. 329, 353 (1937); **Standard Oil Co. v. United States**, 267 U.S. 76, 79 (1925 (where U.S. issues insurance policies in familiar form and consents to suit, it is subject to incidents of suits in insurance business); cf. **Alyeska Pipeline Service Co. v. Wilderness Society**, 421 U.S. 240 (1975) (no recovery of attorneys' fees against United States because no waiver of immunity); **NAACP v. Civiletti**, 609 F.2d 514, 518 (D.C. Cir. 1979), cert. denied, 447 U.S. 922 (1980) (no recovery of attorneys' fees against United States because no waiver of immunity). We do not have to choose between the two alternative approaches because we do not believe Congress either expressly or impliedly has authorized interest in a Title VII action against a governmental entity.

in Title VII, as amended in 1972, that overcomes the sovereign immunity barrier regarding prejudgment interest and therefore that prejudgment interest is not available in Title VII actions against the government. See **Saunders v. Claytor**, 629 F.2d 596 (9th Cir. 1980), cert. denied, 450 U.S. 980 (1981) (Title VII action against the Navy); **Blake v. Califano**, 626 F.2d 891, 894-95 (D.C. Cir. 1980) (Title VII action against HEW); **deWeever v. United States**, 618 F.2d 685 (10th Cir. 1980); **Fischer v. Adams**, 572 F.2d 406, 411 (1st Cir. 1978) (Title VII action against Dept. of Transportation); **Richerson v. Jones**, 551 F.2d 918, 925 (3rd Cir. 1977) (Title VII action against the Navy). We have been unable to find a contrary decision from any of the circuit courts of appeals.

Cross attempts to avoid the impact of this clear line of authority by means of an argument based upon the Postal Reorganization Act of 1970, 39 U.S.C. §§ 101-5605 (the Reorganization Act), which contains a broad waiver of sovereign immunity. Under the Reorganization Act, Congress provided the USPS with the power "to sue and be sued in its official name." 39 U.S.C. §401(1). Section 401(1), Cross argues, removed the barrier of common law sovereign immunity that prevents an award of interest against the federal government; prejudgment interest was therefore among the remedies available when Congress

made Title VII applicable to the USPS in 1972. This argument is ingenious, but we do not find it persuasive.[3]

To adopt Cross's argument, we would have to believe that Congress intended to place postal employees in a better position than all other federal employees with respect to prejudgment interest in Title VII cases. Congress, however, consistently has treated postal employees the same as other federal employees for purposes of laws enforcing equal employment opportunity. There is nothing to suggest that the remedies available to postal employees in Title VII cases should differ from those available to other federal employees in such cases. The Reorganization Act and its legislative history establish conclusively that under that Act, postal employees were to be treated as other federal employees for equal

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[3]Cross relies on the only decision allowing prejudgment interest against the USPS—**Milner v. Bolger,** 546 F.Supp. 375 (E.D. Cal. 1982). The **Milner** court analyzed the scope of the "sue and be sued" clause in the USPS enabling act under the rubric of **FHA v. Burr,** 309 U.S. 242 (1940). In **Burr,** the Supreme Court held that a "sue and be sued clause" in the National Housing Act made the Federal Housing Administration subject to garnishment for moneys due to an employee. In so holding the Court remarked that "clearly the words 'sue and be sued' in their normal connotation embrace all civil process incident to the commencement or continuance of legal proceedings." Id. at 245. Unlike the district court in **Milner,** we believe the controlling statute is Title VII. **Burr** and the line of cases following it are thus inapposite to the issue in this case. We disagree with the **Milner** court's method of analysis, and we decline to adopt either its reasoning or its conclusion.

employment opportunity purposes. Although Congress expressly stated that the general nondiscrimination policy found in 5 U.S.C. §§ 7201-7211 (Chapter 72) and the provisions of Title VI of the 1964 Civil Rights Act should apply, it did not mention Title VII in the Reorganization Act and it did not amend the Reorganization Act after 1972 to include reference to Title VII. See 39 U.S.C. § 410(b)(1), §410(b)(6).

At the time the Reorganization Act was pending in Congress, the discussion on the House floor suggested that the Senate version of the Reorganization bill would have applied the provisions of Title VII, then applicable only to the private sector, to postal employees. 116 Cong. Rec. 27, 597-98 (1970) (statements of Representatives Hawkins and Daniels). The conference committee, however, rejected this suggestion and the bill as enacted into law provided that discrimination complaints against the USPS would continue to be heard by the Civil Service Commission, as in the case of other federal sector employers at that time. See 39 U.S.C. §410.

There is thus no basis upon which to infer that Congress intended the 1970 Reorganization Act's "sue and be sued" clause to affect the remedies available to postal employees under the 1972 amendments to Title VII. Accordingly, we need not decide whether the clause would waive immunity for the purpose of allowing prejudgment interest were the clause applicable to the matter of remedies in the instant case.

For the reasons set forth above, we hold that Congress has not waived sovereign immunity with regard to prejudgment interest in actions against the USPS under Title VII. The judgment of the District Court is affirmed.

ARNOLD, Circuit Judge, dissenting.

The Court's analysis is founded on the assumption that because the plaintiff's cause of action arose under Title VII, any waiver of sovereign immunity with respect to prejudgment interest must be found in Title VII rather than in the Postal Reorganization Act of 1970, 39 U.S.C. §401(1). Neither of the cases cited for this novel proposition goes so far. **Murray v. United States,** 686 F.2d 1320, 1324-25 (8th Cir. 1982), cert. denied, 103 S.Ct. 788 (1983), rejected the argument "that a waiver of sovereign immunity must be implied where it is alleged that the IRS has failed to comply with the seizure and sale provisions in the Internal Revenue Code," because, otherwise, "the IRS would be free to violate Congressional mandates with impunity." **Garcia v. United States,** 666 F.2d 960, 966 (5th Cir. Unit B), cert. denied, 103 S.Ct. 73 (1982), held that Title V of the Organized Crime Control Act does not waive sovereign immunity so as to enable a former protected witness to sue for damages for his allegedly wrongful expulsion from the federal Witness Protection Program. Both of these cases merely applied the well-established rule that a waiver of sovereign immunity "cannot be implied but must be unequivocally

expressed." **United States v. King**, 395 U.S. 1, 4 (1969). Neither case held that a clear waiver found in one statute cannot be given effect in a case arising under another statute.

Section 401(1) of Title 39 provides:

> The Postal Service shall have the following general powers:
>
> (1) to sue and be sued in its official name. . . .

In **Federal Housing Administration v. Burr**, 309 U.S. 242 (1940), the Supreme Court held that a "sue-and-be-sued" clause rendered the FHA subject to state garnishment proceedings. The Court said,

> [W]e start from the premise that such waivers by Congress of governmental immunity in case of such federal instrumentalities should be liberally construed. . . . Hence, when Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to "sue and be sued," it cannot be lightly assumed that restrictions on that authority are to be implied. Rather if the general authority to "sue and be sued" is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the "sue and be sued" clause in a narrow sense. In the absence of such showing, it must be presumed

> that when Congress launched a governmental agency into the commercial world and endowed it with authority to "sue or be sued," that agency is not less amenable to judicial process than a private enterprise under like circumstances would be.
>
> Clearly the words "sue and be sued" in their normal connotation embrace all civil process incident to the commencement or continuance of legal proceedings.

Id. at 245 (footnote omitted). See also **Kosak v. United States**, 52 U.S.L. Week 4367, 4368 n. 9 (U.S. Mar. 21, 1984) ("'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.'") (quoting **Anderson v. Hayes Constr. Co.**, 243 N.Y. 140, 147, 153 N.E. 28, 29-30 (1926) (Cardozo, J.)).

In **May Department Stores Co. v. Williamson**, 549 F.2d 1147, 1148 (8th Cir. 1977), we followed **Burr** and held that, in enacting §401(1), Congress waived the Postal Service's immunity from state garnishment proceedings. Thus, the cases relied upon by the Court today for the general proposition that prejudgment interest is not available in Title VII actions against the government are not in point, because none of those cases involved a Title VII suit against an agency empowered to "sue and be sued." Accord, **White v. Bloomberg**, 501 F.2d 1379, 1385-86 (4th Cir. 1974) (holding Postal Service subject to award of postjudgment interest in suit brought under the Back

Pay Act); see also **Richerson v. Jones,** 551 F.2d 918, 925-26 n. 11 (3d Cir. 1977).1/

The question here is not whether "Congress has . . . expressed an affirmative intention to allow interest." Ante at 3 (footnote omitted). Rather, it is whether Congress has expressed an affirmative intention to restrict the Postal Service's general amenability to suit and all the normal incidents thereof so as to bar awards of prejudment interest. The Court makes much of the fact that, in enacting the Postal Reorganization Act, Congress did not extend the provisions of Title VII, then inapplicable to federal employees, to postal employees. From this, the Court concludes that Congress intended that postal

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1/ The Court notes, ante at 3 n. 2, that there is authority suggesting that "interest on claims against the United States cannot be recovered in the absence of an express provision to the contrary in the relevant statute or contract." **United States v. Alcea Band of Tillamooks,** 341 U.S. 48, 49 (1951) (per curiam). Nevertheless, the Supreme Court has held that where the government enters the realm of private enterprise and consents to be sued, prejudgment interest is recoverable as an ordinary incident of suit. **Standard Oil Co. v. United States,** 267 U.S. 76, 79 (1925). While the Postal Service is not technically a government corporation, it is similar enough to a private business endeavor to come within the holding of **Burr, May Department Stores Co.,** supra and I see no reason why it should not be subject to the rule of **Standard Oil** as well. Accord, **White v. Bloomberg,** supra. See also **Bituminous Casualty Corp. v. Lynn,** 503 F.2d 636, 643-46 (6th Cir. 1974). But see **Riverview Packing Co. v. Reconstruction Fin. Corp.,** 207 F.2d 361, 370 (3d Cir. 1953).

employees be treated the same as all other federal employees with regard to nondiscrimination laws. I do not believe that this inference is compelled.

First, "[i]n addition to the power to sue and be sued, Congress has assigned a superabundance of power to USPS in making it an 'independent establishment,' operating in a 'business-like' way to make delivery of the mail 'a self-supporting enterprise.'" **Standard Oil Division, American Oil Co. v. Starks,** 528 F.2d 201, 203 (7th Cir. 1975) (per curiam). For example, the Service was given a broad range of typical corporate powers, including the power to make and perform contracts; to keep its own system of accounts; to buy, sell, lease, and operate property; to accept gifts; and to compromise claims against it. 39 U.S.C. §401(3)-(8). The congressional intent is equally manifest with regard to employee relations. Congress directed that Postal Service employees be compensated at a rate comparable to that of employees in the private sector. 39 U.S.C. §§101(c), 1003(a). Congress also granted postal employees the right to bargain collectively and made labor-management relations subject, in general, to the National Labor Relations Act. 39 U.S.C. §§1201-1209.

Second, when Congress amended Title VII to make it applicable to all federal employees, it intended to accord "[a]ggrieved [federal] employees or applicants . . . the full rights available in the courts as are granted to indivduals in the private sector under Title VII." **Chandler v. Roudebush,** 425 U.S. 840, 841 (1976) (quoting S. Rep.

No. 415, 92d Cong., 1st Sess. 16 (1971)). Title VII contains no language limiting the relief available to federal employees; limits on prejudgment interest have been imposed solely because of the barrier of sovereign immunity - a barrier deliberately lifted by Congress when it created the Postal Service.

In sum, I agree with the decision in **Milner v. Bolger**, 546 F.Supp. 375 (E.D. Cal. 1982). I do not believe that the mere fact that, in 1970, Congress declined to apply Title VII only to federal employees who work for the Postal Service should be used to frustrate Congress's evident intent in 1972 to accord employees of the Postal Service, an independent federal establishment closely resembling a private business enterprise, the same rights accorded employees of private businessess. Accordingly, I respectfully dissent.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Civil Action No. 77-613 C(1)

Rebecca Mae Cross,
Plaintiff,
v.
United States Postal Service, et al.
Defendants.

ORDER

This matter is before the Court upon plaintiff's motion to reconsider the issue of prejudgment interest.

The Court has reviewed the authority cited by plaintiff. See, **Milner v. Bolger,** 546 F.Supp. 375 (E.D. Cal. 1982). After carefully studying **Milner v. Bolger,** the Court remains convinced that an award of prejudgment interest in the instant matter is unwarranted. See, **Saunders v. Claytor,** 629 F.2d 596, 598-99 (9th Cir.) cert. denied 101 S.Ct. 1550 (1980). The Court believes that the circumstances of this case militate against an award of prejudgment interest. Furthermore, the Court finds that

39 U.S.C. § 401(1) does not amount to a waiver of the Postal Service's sovereign immunity. Accordingly,

IT IS HEREBY ORDERED that plaintiff's motion to reconsider the denial of prejudgment interest be and is DENIED.

Dated this 5th day of January, 1983.

/s/H. Kenneth Wangelin
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Civil Action No. 77-613 C(1)

Rebecca Mae Cross,
Plaintiff,
v.
United States Postal Service, et al.
Defendants.

MEMORANDUM AND ORDER

The present action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000(e) et seq., is before the Court on remand from the United States Court of Appeals for the Eighth Circuit. The Court of Appeals directed the court to:

> 1. To enter an order requiring the Postal Service to offer Cross the first vacancy in the position of keypunch operator in the St. Louis office of the Postal Service.
>
> 2. To determine the back pay to which Cross is entitled. This is to be computed on the basis of the difference between what Cross earned in the position she has held since November, 1976, and what she would have earned had she been hired

that time as a computer operator by the Postal Service.

3. To determine an award of reasonable attorney's fees and expenses to counsel for Cross for services rendered in the district court.

The Court had hoped that the parties would stipulate to the facts and the appropriate relief the Court of Appeals requested. Unfortunately, disagreements have arisen concerning the parties' stipulations.

On September 21, 1981, the parties negotiated a settlement agreement in which they stipulated to most of the facts and issues, including back pay and plaintiff's reinstatement position with defendant, left open by the Court of Appeals' mandate. Very shortly thereafter, plaintiff learned that Carol Glaza, one of the keypunch operators at the time plaintiff was not hired but for racial discrimination, received a second promotion on May 30, 1981 to the position of Data Control Technician (comparable to the Computer Operator, Junior position). Plaintiff alleges that she had relied upon Ms. Glaza's progreses in negotiating the settlement agreement with defendants, indeed, Glaza's employment history was a "model" for figuring plaintiff's hypothetical employment fortunes with defendant.[1] See, **N.L.R.B. v. International**

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[1]Glaza's employment history was the basis for the parties' determination of the overtime and night premium hours plaintiff would have worked had she been in defendant's employ.

Union of Operating Engineers, 460 F.2d 589, 599 (5th Cir. 1972). Since Glaza had received a subsequent promotion, plaintiff maintains that her position with defendants should similarly reflect a promotion in the position. For this reason, plaintiff refuses to abide by the stipulation.

It is plaintiff's position that defendant possessed material information concerning Glaza's promotion which they did not divulge to plaintiff during settlement negotiations and that this failure justifies voiding the settlement as it relates to plaintiff's employment position with defendant. Plaintiff recommends that the settlement agreement be enforced as is except that plaintiff should be placed in an employment position (in this case either Computer Operator, Junior or Computer Operator, Senior) similar to that attained by Glaza. Defendant asserts that the settlement agreement should either be enforced entirely or completed [sic] voided.

The initial question raised is whether defendant had any duty under Rule 26 of the Federal Rules of Civil Procedure to supplement its interrogatory responses with respect to Glaza's employment history. The operative section is Rule 26(e)(2) which states that:

> A party must seasonably amend a prior response if a party obtains information from which either he knows that the response was incorrect when made, or he knows that the response the correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

8 Wright & Miller, **Federal Practice and Procedure,** §2049 at p. 323 (1970). The rule does not plainly speak to the interstitial situation presented herein. Indeed, as this Circuit has recognized the issue of whether a party is under a continuing duty to amend its answer to an interrogatory which may have been complete and correct when given but has become incomplete, incorrect, inaccurate and possibly misleading because of subsequent developments, is unsettled under the rules and is an evolving one that will have to be resolved under trial tested experiences of varying factual situations. **Greyhound Lines, Inc. v. Miller,** 402 F.2d 134, 141-44 (8th Cir. 1968). Whether the information was material to the case, whether the information occurred subsequent to the interrogatory responses, whether the investigating party was prejudiced by the lack of disclosure and the relative accessibility of the answering party to the information are all important factors in determining whether there was a duty to amend. Id.

In the case at bar, there can be little doubt that plaintiff did rely upon the employment history of Carol Glaza in negotiating a settlement with defendant. It is also apparent from the interrogatories propounded to defendant that defendant knew or should have known the importance plaintiff placed upon accurate, current information regarding Glaza's status with defendant. See Plaintiff's Third Set of Interrogatories, March 16, 1981,

Interrogatory Number 2. While it is unclear whether defendants' attorneys did have actual knowledge of Glaza's May 31, 1981 promotion, such information was readily available without investigation to defendants and obtaining said information would not have entailed undue hardship. See generally **E.E.O.C. v. Hickey-Mitchell Co.**, 372 F.Supp. 1117 (E.D.Mo. 1973). Plaintiff also alleges, and defendant does not deny, that plaintiff made further inquiry to defendant by a September 8, 1981 letter concerning Ms. Glaza's employment history with defendant. Finally, the Court believes that the information withheld was material and that plaintiff was prejudiced by defendant's lack of disclosure.

The discovery provisions of the Federal Rules of Civil Procedure attempt to avoid surprise, attempt to narrow the issues, engender truthfulness and candor between members of the bar and the Court. All the evils to which Rule 26 was directed are present in the instant case: defendant was on notice that the requested information was material to plaintiff; that plalintiff had relied upon an earlier answer which without amendment had become incorrect or inaccurate; that the information was within defendant's possession and was readily available; that plaintiff had made a new request to defendant that defendant's answers be supplemented; and that plaintiff was surprised and prejudiced by non-disclosure. See **Greyhound Lines, Inc. v. Miller**, supra, at 141-44. Based upon the circumstances of this case, defendant had a duty

to amend its interrogatory answers and inform plaintiff that Carol Galza had attained a higher position with the Postal Service. In so finding, the Court stresses that defendant's dereliction was not motivated by bad faith or animus toward plailntiff.

Defendant's failure to supplement its interrogatory answers obviates enforcement of the portion of the stipulation agreement which relates to plaintiff's reinstatement position with the Postal Service. The Court must now decide whether the settlement agreement shall in all other respects be enforced. Settlements are favored by the law and those agreements voluntarily entered into between parties in Title VII lawsuits are enforceable whether in writing or not. See **Alexander v. Gardner Denver Co.**, 415 U.S. 36, 52 n.15 (1974); **Dependahl v. Falstaff Brewing Corp.**, 448 F.Supp. 813, 815 (E.D.Mo. 1978). To determine whether the parties intended to be bound by the agreement, the Court will scrutinize the course of negotiations, agreement of material terms, whether the parties described the settlement as such, and whether any existing disagreements were technicalities. **Dependahl v. Falstaff Brewing Corp.**, supra, at 815. In the instant controversy, the agreement sought to be enforced was the product of extensive negotiations between the parties and was substantially consummated on the day this matter had been set for trial. There was definitely agreement between the parties on material issues; in fact, the only real issue left open was

prejudgment interest. The parties not only described the agreement as a stipulation, but orally indicated the same to the Court. Finally, the only existing disagreements at the time of settlement were relatively minor—prejudgment interest. The parties had agreed on the material issues dividing them and they should be bound by that agreement. Therefore, the Court will enforce the settlement agreement except that the portion of the agreement dealing with plaintiff's reinstatement position will be rescinded under the Court's equitable powers. The Court believes such an approach is faithful to the parties' intentions, yet, relieves plaintiff of any mistake of fact.

Title VII's "rightful place" remedial provisions provide that plaintiff is entitled to be reinstated at as close a position as possible to the position she would have occupied if the wrong had not been committed. **Albemarle Paper Company v. Moody,** 422 U.S. 405, 418-19 (1975); **Rogers v. International Paper Company,** 510 F.2d 1340, 1354-55 (8th Cir. 1975). This may entail the promotion of the victim of discrimination, nevertheless, the employee must be qualified for her new position. See, **Marquez v. Omaha District Sales Office,** 440 F.2d 1157, 1162-63 (8th Cir. 1971). To determine whether "job-skipping" is an appropriate remedy, the district court must ask whether (1) plaintiff has the particular skills or other job related qualifications required by the employer; (2) that the new position is in a line of progression upward from the position plaintiff originally would have held but for defendant's

discrimination; and (3) that prerequisite service at a lower position is not in itself justified by business necessity aside from the skills or other qualifications to perform the new position. **Locke v. Kansas City Power and Light Co.,** 660 F.2d 359, 369 (8th Cir. 1981). The court may use a "representative employee" to determine what reinstatement relief is proper. **N.L.R.B. v. International Union of Operating Engineers,** supra, at 599.

Plaintiff's original salary position with the Postal Service was Level 5, step 3. It was defendant's policy at the Postal Data Center (hereinafter P.D.C.) to promote a postal employee at one step below the step she would have been had she previously worked at the P.D.C. rather than the Postal Service. Thus, had plaintiff been hired in November or December of 1976, she would have held a keypunch operator job (Data Conversion Operator) at Level 6, step 2.

It is plalintiff's position that as of June 2, 1979, she was also entitled to the Computer Peripheral Operator position, which is a level 8 salary position.[2] The Director of Operations Division houses the computer related positions at the P.D.C. Within the Operations Division are two branches of computer operations: the Production Management Branch and the Computer Operations Branch.

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[2]Carol Glaza attained this position on June 2, 1979. Glaza received a promotion to Computer Data Technician, Level 10, on May 30, 1981, and on November 28, 1981 was elevated to the Level 13 Data Control Technician, Senior position.

From a Data Conversion Operator position, an employee may progress upwardly to a Level 8 position either as a Computer Peripheral Operator (Computer Operations Branch) or as a Data Control Technician, Junior (hereinafter DCT/Jr.) (Production Management Branch). See, Rochester deposition, at 4-5; 28-30; 38-40. An employee must usually work at least one year at the Data Conversion Operator position before she becomes eligible for a Level 8 promotion. The five years of key punch experience plaintiff had with the Army satisfies any prerequisite service requirement for a Level 8 Computer Peripheral Operator position (hereinafter CPO). Defendant argues that the Postal Service stressed the importance of tardiness and unexcused emergency absence in its factors in the CPO selection process. Therefore, plaintiff would not be qualified for the CPO position because of her record of tardiness and unexcused absences with the Army. The Court has examined what is available of plaintiff's Army record, and finds that defendant's argument has no merit. Indeed, plaintiff's absence record with the Army paralleled that of Glaza who did receive a Level 8 promotion. Plaintiff is entitled to have been reinstated at a Level 8 CPO position.

Plaintiff further maintains that she is entitled to retroactive reinstatement as a Level 10, step 8 DCT. The record indicates that specialized experience is necessary in order to be promoted to a Level 10 position, but that such experience may be obtained through "on-the-job"

training at a Level 8 position. Because of defendant's discrimination, plaintiff was never able to acquire the on-the-job training at Level 8. Plaintiff should not be penalized for defendant's discrimination. **Wells v. Meyer's Bakery**, 561 F.2d 1268, 1273 (8th Cir. 1977). Moreover, there is precedent at the PDC for training at a DCT Level 10, (CPO Level 10) while on the job at that level. See Rochester deposition at 52. Plaintiff is entitled to the position Glaza attained as DCT Level 10, step 8.

Finally, plaintiff urges the Court to place her in the Level 13 DCT/Sr. position achieved by Glaza on November 28, 1981. Glaza's promotion came well after the parties' settlement agreement was consummated, thus plaintiff cannot argue that the information supporting plaintiff's rise to a Level 13 position was withheld by defendant during settlement negotiations. While the training for a Level 13 position is similar to that requisite for a Level 10 position, there is some additional level 10 specialized training before one leaps from a Level 10 to Level 13. The Court believes that plaintiff should not be penalized for the lost opportunity to acquire Level 10 training, however, the Court is not convinced that plaintiff is qualified for a Level 13 job. Nor does the Court place much credence in plaintiff's self-serving deposition to the effect that her experience in the Army meets the qualifications requisite for a Level 13 position nor does the Court believe that plaintiff's claim is entirely

foreclosed by her refusal to accept defendant's offer of re-employment. It is the Court's position that the best course to travel is to place plaintiff in a Level 10 position of DCT/Jr. (CPO) where she can acquire the training necessary to qualify for a Level 13 position, and should she qualify for a Level 13 position on her own merits, then the promotion will be considered retroactive to November 28, 1981, the date of Glaza's promotion. Accordingly,

IT IS HEREBY ORDERED, effective at a date yet determined, that plaintiff be and is reappointed to the position of Data Conversion Operator at the St. Louis Postal Data Center, effective December 4, 1976 at pay Level 6, Step 2; and

IT IS FURTHER ORDERED that plaintiff be and is entitled to retroactive in-level step increases from December 4, 1976 forward. On June 2, 1979, plaintiff's pay level will change to Level 8, step 6. On May 30, 1981, plaintiff's pay level will change to Level 10, step 8. She will assume the position of Data Control Technician, (Computer Operator, Junior) when the next vacancy occurs. Effective with the date plaintiff actually returns to duty, for a period of one and one-half years or when two Computer Operator, Senior vacancies occur, whichever is longer, plaintiff will be paid at a pay level 10. During this period, plaintiff will be interviewed for every Computer Operator, Senior vacancy she applies for,

and if she thereafter obtains a promotion to Computer Operator, Senior on her own merits, said promotion should be considered retroactive to November 28, 1981; and

IT IS FURTHER ORDERED that upon reinstatement with the Postal Data Center plalintiff will immediately take a vacation for a period yet to be determined. Upon her return from vacation she will assume the position of Computer Operator, Junior as set out above; and

IT IS FURTHER ORDERED, in accordance with the parties' stipulation and settlement, that plaintiff's sick leave balance upon her reassignment to the Postal Data Center will be one hundred and four (104) hours. Defendant will reimburse the Army for advanced sick leave, if required. Her annual leave balance from the Department of Army will be transferred as is. Effective with the date of reassignment plaintiff will be credited with an additional one hundred sixty (160) hours of annual leave plus the advance of annual leave for the remainder of the year at the normal rate; and

IT IS FURTHER ORDERED that for back pay purposes plaintiff will be held to have worked the hours of Carol Glaza for the period December 4, 1976 to the date she is reassigned to the Postal Data Center. Plaintiff's rate of pay will be applied to these hours computing a total back pay figure. This will include all premium hours worked by Glaza. Plaintiff's interim earnings with the Department of the Army will be deducted from this total back pay figure. A check in this amount will be issued

to plaintiff payable to Rebecca Cross and her counsel. Plaintiff will be paid the difference between what she paid for health insurance premiums while employed with the Department of the Army and what she would have paid for the same plan had she been working for the Postal Data Center during this period; and

IT IS FURTHER ORDERED that plaintiff will be paid by the defendant the difference between what she paid for life insurance while employed by the Department of the Army and what she would have paid had she been working for the Postal Data Center during this period; and

IT IS FURTHER ORDERED that for income tax purposes ten per cent (10%) of plaintiff's back pay award will be withheld; and

IT IS FURTHER ORDERED that plaintiff's counsel shall recover attorney's fees in the amount of Sixteen Thousand Dollars ($16,000) for all work performed through September 21, 1981 computed as follows:

211.7 hours at a rate of $75.00 for
attorneys Kenneth M. Chackes and Michael J. Hoare;
2.7 hours at a rate of $50.00 per hour
for attorney Lee T. Lawless

IT IS FURTHER ORDERED that plalintiff shall not recover prejudgment interest on monetary awards. **Saunders v. Claytor,** 629 F.2d 596 (9th Cir. 1980), cert. denied 101 S.Ct. 1550 (1980) (see cases cited therein); and

IT IS FURTHER ORDERED that defendant shall compute the monetary awards to be made to plaintiff pursuant to this Order, the settlement agreement and stipulation, and shall within twenty (20) days from the date of this Order, file a report with the Court (with a copy to plaintiff's attorneys) reflecting said computations.

Dated this 30th day of June, 1982.

/s/ H. Kenneth Wangelin
United States District Judge